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HAROLD B. WILLE

IN THE

Supreme Court of the United States

October Term, 1955

No. 712

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

AUGUST FAUCETTA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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FREDERICK S. ABRAMS,
On the Brief.

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TABLE OF CONTENTS

	PAGE
BASIS OF JURISDICTION	2
THE QUESTIONS PRESENTED FOR REVIEW	2
APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS	4
ARGUMENT	4
CONCLUSION	13

AUTHORITIES CITED

Cases

People v. Faucetta, 139 N. Y. S. (2d) 910, 285 App. Div. 967 2
People v. Guariglia, 303 N. Y. 338 10
People v. Langan, 303 N. Y. 474 6
People v. Moesel, 134 N. Y. S. 2d 567 (not officially reported) 11
People v. Richetti, 100 N. Y. S. 2d 41 (not officially reported) 6, 10, 11

Statutes

Code of Criminal Procedure of the State of New York:
Section 308 4
Constitution of the United States:
14th Amendment, Section 1 4
Constitution of the State of New York:
Article 1, Section 6 4

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

AUGUST FAUCETTA, the petitioner herein, respectfully prays that a writ of certiorari issue to review a final order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated and entered on the 14th day of March, 1955, affirming an order of the County Court of Nassau County, made and entered on the 22nd day of July, 1954, denying petitioner's application for a Writ of Error *coram nobis* to set aside

and vacate a judgment of the County Court of Nassau County, imposed on petitioner on September 8, 1932, and to review a decision of the Chief Judge of the New York State Court of Appeals denying petitioner's application for a Certificate to appeal to the New York State Court of Appeals.

Basis of Jurisdiction

An appeal was taken to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, which Court affirmed the order denying petitioner's application for a Writ of Error *coram nobis* on March 14, 1955 (139 N. Y. S. (2d) 910, 285 App. Div. 967). No opinion was rendered.

Application for a Certificate to appeal to the New York State Court of Appeals from a judgment of the Court of Appeals was denied by Chief Judge Albert Conway of the Court of Appeals of the State of New York on October 14, 1955.

Application by petitioner for an extension of time pursuant to Rule 22 of the Rules of the Supreme Court of the United States to file his petition for certiorari was granted by Associate Justice Harold H. Burton on the 11th day of January, 1956, granting petitioner until February 28, 1956 to perfect his petition.

The Questions Presented for Review

The petitioner, at the time he was arraigned upon an indictment in the County Court of Nassau County, was not represented by counsel, was not advised of his right

to counsel, did not waive his right to counsel, and at the time he pleaded guilty to the crime of robbery in the third degree, was not represented by counsel, nor was he aware of his right to counsel, nor did he waive his right to counsel, and further, at the time he was sentenced upon said conviction he was not represented by counsel.

By order of the County Court of Nassau County, a hearing was directed upon the issues raised by the petition, and such hearing was held on the 16th day of June, 1954. At the hearing, the only evidence offered by respondent was testimony of the jailer of the Nassau County Jail to the effect that his records indicated that an attorney named Baldassare Lamberta visited petitioner in jail on three occasions, and the testimony of the County Clerk of Nassau County only as to the custom of inserting the attorney's name in the pedigree, if an attorney was present at the time a plea is taken, but that he had no independent recollection of the instant case. The questions presented are:

(1) Was there a violation of due process of law in failing to advise petitioner of his right to counsel, and in that he was actually not represented by counsel at the arraignment to the charge?

(2) Was there a denial of due process in that at the time petitioner pleaded guilty to the crime of robbery in the third degree, he was not represented by counsel, nor was he aware of his right to counsel, nor did he waive his right to counsel?

(3) Was there a denial of due process in that at the time petitioner was sentenced upon said conviction he was not represented by counsel?

Applicable Constitutional and Statutory Provisions

(A) Constitution of the United States—Section 1 of the Fourteenth Amendment: "* * * Nor shall any State deprive any person of life, liberty or property without due process of law * * *."

(B) Constitution of the State of New York, Article 1, Section 6: "* * * No person shall be deprived of life, liberty or property without due process of law."

(C) Code of Criminal Procedure of the State of New York:

> "(1) Section 308. Defendant appearing for arraignment without counsel to be informed of his right to counsel.
>
> "If the defendant appear for arraignment without counsel he must be asked if he desires the aid of counsel and if he does the court must assign counsel * * *"

Argument

Due process of law requires that a defendant in a criminal case be represented by counsel. Here the testimony was clear not only from the petitioner and petitioner's brother, Anthony Faucetta, who was a co-defendant with the petitioner, but from Baldassare Lamberta, an attorney-at-law, who has served with honor and distinction in the County of Kings for over forty-three years, who appeared on the witness stand, and after oath to tell the truth, stated as follows:

> "Q. Now, after you saw him in the Nassau County Jail, did you ever appear for him in court at any time? A. No.

"Q. On July 18, 1932 did you appear for him in court and enter a plea for him of robbery in the 3rd degree? A. I did not.

"Q. On September 18, 1932 did you appear for him in court at the time of his sentence? A. I did not.

"Q. Did you ever receive any fee from this defendant of any kind in this case? A. No, sir.

"Q. Did this defendant ever authorize you to appear in court for him? A. No, he did not."

This testimony of Mr. Lamberta cannot be rejected. There is nothing in the record to overcome the clear and unequivocal answers of Mr. Lamberta that he never appeared for petitioner in court at any time, that he never appeared for him nor entered a plea for him of robbery in the third degree, that he did not appear for him at the time of the sentence, that he never received a fee from petitioner of any kind in this case, and that petitioner never authorized him to appear for him. In addition to this testimony of Mr. Lamberta, a disinterested witness and an officer of the Court, there is corroborating testimony from the petitioner and that of petitioner's brother. Moreover, there is further corroboration by the photostatic copy of the endorsements upon the indictment which appeared at page 49 of the record, where it clearly shows an absence of any notation of counsel for the defendant Guisto Faucetta (August Faucetta) although there does appear the notation showing the name Fleckenstein as counsel for someone upon the indictment. It was conceded by the District Attorney upon the hearing of this matter that Mr. Fleckenstein, who is presently an Assistant District Attorney on the staff of the District Attorney of the

County of Nassau, never appeared for nor represented the petitioner herein. Due to the absence of any notation of counsel upon the indictment, the inevitable conclusion must be that no counsel appeared and represented this petitioner at the time of the arraignment. The case at bar is very similar to the case of *People* v. *Langan,* reported in 303 N. Y., page 474. In said case there appeared to be a record of a lawyer appearing for the defendant Langan, and although the lawyer could not remember whether he appeared or not, the Court felt, despite the record, in view of the statement of the defendant that he was never represented, it required a hearing. Relief was subsequently granted to said appellant even though the lawyer whose name appeared as having represented him could not state whether or not he appeared for the said defendant. In this case the attorney whose name appears on the record clearly stated he did not represent this petitioner.

The question of determining credibility of witnesses in a case such as this is very clearly enunciated in the case of *People* v. *Richetti,* 100 N. Y. S. 2d at page 41 (not officially reported), when County Judge Farrell, after conducting a hearing pursuant to the mandate of the Court of Appeals, in reversing the said case and directing a hearing, points out as follows:

> "As the duty of determining credibility upon a trial of this kind is on the trial judge. People v. Richetti, 302 N. Y. at 298, 97 N. E. at page 912; accord, Hawk v. Olson, 326 U. S. 271, 66 S. Ct. 116, 90 L. Ed. 61, we look for guidance to pertinent doctrines culled from the authorities: 'It is undoubtedly the general rule where unimpeached witnesses

testify distinctly and positively to a fact and are uncontradicted, their testimony should be credited and have the effect of overcoming a mere presumption.' Elwood v. Western Union Telegraph Company, 45 N. Y. 549, 553-554.

"The rule is, of course, qualified by usual considerations of interest, character, and improbability of the testimony, so that the trier of the facts, using 'a common process of reasoning.' People v. Rubin, 284 N. Y. 392, 396, 31 N. E. 2d 501, 502, is 'not bound to refrain from exercising judgment and blindly adopt the statement of the witness,' though his character is unimpeached and he is not contradicted by another witness, Elwood v. Western Union Telegraph Co., supra; and though a witness be 'of bad character, a criminal, and a perjurer,' and so subject to discredit, although not contradicted, his testimony, like that of any witness interested or disinterested, is for the trier of the facts. People v. Tuczkewitz, 149 N. Y. 240, 251, 43 N. E. 548, 552.

"But—and this is of controlling effect here—where such a witness, though a party, and so interested in the outcome, testifies to 'important particulars' and there is 'no conflict in the evidence, or anything or circumstances from which an inference against the fact testified to by him could be drawn.' Kelly v. Burroughs, 102 N. Y. 93, 95-96, 6 N. E. 109, 110, and he is not impeached or contradicted by affirmative proof or by circumstances. Elwood v. Western Union Telegraph Co., 45 N. Y. at 554; Lomer v. Meeks, 25 N. Y. 361, 363, and his testimony is 'clear' and 'positive and direct and not incredible on its face' and 'is' such that its truth is highly probable, Denton v. Carroll, 4 App. Div. 532, 534, 40 N. Y. S. 19, 21, such testimony 'cannot be disregarded by court or jury arbitrarily

or capriciously. They are bound to believe, for judicial purposes, such testimony.' Lomer v. Meeks, supra, 25 N. Y. at 363; Strong v. Walton, 27 Misc. 240, 251, 58 N. Y. S. 761, 762. We observe that the statement 149 N. Y. at pages 251-252 of the Tuczklewitz case, supra, 43 N. E. at page 552: 'The rule, however, has no application to criminal cases,' merely refers to the respective functions of court and jury in a criminal case, but leaves untouched the applicability of the substance of the rule in cases where, as here, the judge is the trier of the facts.

"In addition to the general doctrine concerning the rebutting of a presumption the following considerations are pertinent. Here defendant testified to an asserted fact extrinsic of any component part of the official judgment-roll, but purportedly within his personal knowledge. If believed, the testimony is 'substantial evidence' to the 'contrary' of the presumption and supplements the record by supplying the fact; i.e., that the advice concerning counsel was not given. The statute imposes the duty to do so, but whether the duty was discharged in this case is substantive and material fact, independent of the existing record; and as observance of the mandate is a 'basic jurisdictional requirement' that 'goes to the very essence of according due process'. Matter of Bojinoff v. People, 299 N. Y. at 149-150, 85 N. E. 2d at page 911, the presumption cannot supply proof of that fact. 'While the law will presume in favor of regularity of an official's act, it will not by such presumption supply the necessary jurisdictional facts.' Jones Comm. Ev., sec. 45a; 12 Am. & Engl. Cyc. L., p. 1270; 22 C. J., p. 135, N. 42, 45; 31 C. J. S., Evidence Sec. 146; Best on Ev., 9th Ed., sec. 353; United States v. Ross, 92 U. S. 281, 284-

285, 23 L. Ed. 707; Sabariego v. Maverick, 124 U. S. 261, 284, 8 S. Ct. 461, 31 L. Ed. 430; United States v. Carr, 132 U. S. 644, 10 S. Ct. 182, 33 L. Ed. 483.

"The doctrine is deeply rooted in the rationale of corrective process to the effect that the presumption never survives 'a clear showing to the contrary,' concerning a particular essential ingredient of jurisdiction extrinsic of the record of conviction. In re Cuddy, 131 U. S. 280, 285, 9 S. Ct. 703, 33 L. Ed. 154; also Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398; Tomkins v. State of Missouri, 323 U. S. 485, 65 S. Ct. 370, 89 L. Ed. 407; House v. Mayo, 324 U. S. 42, 65 S. Ct. 517, 89 L. Ed. 739; Rice v. Olsen, 324 U. S. 786, 65 S. Ct. 989, 89 L. Ed. 637; Matter of Bojinoff v. People, 299 N. Y. 145, 85 N. E. 2d 909; People ex rel. Moore v. Hunt, 258 App. Div. 24, 16 N. Y. S. 2d 19.

"A proper regard for the scope of the foregoing doctrines, therefore, constrains the court to impart a measure of credibility to the defendant—though a convicted criminal and, as a party, vitally interested—sufficient to satisfy the tests stated and to dispel the presumption, which never has any 'weight as evidence', People ex rel. Wallington Apts. v. Miller, 288 N. Y. 31, 33, 41 N. E. 2d 445, 446, 141 A. L. R. 1036, and to remit the parties to status quo ante, whereupon 'the case ceases to be one for presumptions and becomes a case for proof,' People v. Richetti, 302 N. Y. at 298, 97 N. E. 2d at page 446, the burden then shifting back to the People, where it was in the beginning. People v. McLaughlin, 291 N. Y. 480, 53 N. E. 2d 356, 'of establishing compliance with the mandatory provision of the statute.' Matter of Bojinoff, supra, 299 N. Y. at 910, 85 N. E. 2d at page 911."

Your petitioner is fully aware that upon an application for a Writ of Error *coram nobis* the petitioner has the burden of overcoming the presumption of regularity which attaches to the court proceeding. However, this does not mean that there is any burden upon the petitioner to prove beyond a reasonable doubt that his contentions are correct. In *People* v. *Richetti,* 302 N. Y., on page 28, it was said:

> "We do not think that presumption of regularity can serve to settle without trial what otherwise would be a plain dispute of fact. A presumption of regularity exists only until substantial evidence appears. People ex rel. Wallington Apts. v. Miller, 283 N. Y. 31, 33, 41 N. E. 2d 445, 141 A. L. R. 1036; Galpin v. Page, 85 U. S. 350, 18 Wall 350, 365, 21 L. E. D. 959, 9 Wigmore on evidence (3rd Edition) 2d 249. It forces the opposing party (defendant here) to go forward with proof but, once he does go forward, the presumption is out of the case. It could not conceivably be used to prevent defendant from proving his allegations."

The Court of Appeals of this State has clearly stated in the case of *People* v. *Guariglia,* 303 N. Y. 338, as follows:

> "The issue here is not so much whether petitioner was timely and properly represented by counsel, but whether under the circumstances of this case it may be said that he consciously knew of and authorized such representation at the time of sentence."

The clear convincing proof of the appellant which overcame the presumption of regularity was met by the District Attorney with testimony showing the three visits to the jail of Mr. Lamberta and the testimony of the Chief

Clerk of the Court to the effect that it was the invariable custom where counsel appeared at the time of a plea, to insert his name in the pedigree. Mr. Bardes, however, was very frank to say that he had no recollection of this case and that anything could have happened to cause such name to be inserted.

Surely, such testimony cannot refute and destroy the positive clear testimony of Mr. Lamberta.

In *People* v. *Moesel,* 134 N. Y. S. 2d 567 (not officially reported), a recent case decided by the Appellate Division of the 3rd Judicial Department, an order of the County Court of Washington County was reversed and a hearing granted even though the record of the Court showed that counsel had appeared for the defendant, and that at a still later date he had appeared for sentence with a lawyer and the lawyer even addressed the Court in his behalf, and solely because the lawyer had stated in two letters that he had no recollection of ever representing the defendant, the Court directed that a hearing be held on the issue.

The duty of the District Attorney, where the presumption is dissolved, is clearly enunciated in a decision in *People* v. *Richetti,* decided by Judge Farrell, *supra,* when he said, at page 43, as follows:

> "With the presumption thus dissolved, decision must rest on proof alone. The district attorney, who commendably produced former stenographer Sullivan—plainly a disinterested witness—concedes that his testimony destroyed the presumption. In the court's view it was defendant's testimony—that he was not warned of his right to counsel—and the unexplained omission of the available records to show the actual fact—that gave flight to the presumption;

and Sullivan's testimony that the court's practice was not to inform a defendant 'in the event where he pleaded guilty,' fortified, if it did not specifically corroborate, defendant's assertions on the crucial issue. The net effect was that at the conclusion of this trial defendant's testimony, *as supported by Sullivan's, sustained his allegations, whereas the People's burden remained unmet. The situation essentially parallels the one in the Bojinoff case, where the People produced no affirmative proof to meet their burden. Neither did they do so here. Besides, there, defendant's testimony stood alone.*

"Consequently, on the authority of the Bojinoff case, it must be held that if defendant's testimony be credited, the jurisdictional fact at issue, that the required advice was not given to defendant, stands judicially established. We think that to deny probative force to defendant's positive assertions in view of the supporting facts and circumstances disclosed by the present record, in which Sullivan's testimony plays a conceded vital part, would be at war with the doctrines examined and result in a clear disservice to the cause of justice. In the comprehensive aspect of this record, this view is not in conflict with rulings where the People's affirmative proof was held sufficient to establish compliance with the statutory requirements, see, e.g., People v. Shapiro, 188 Mis. 363, 67 N. Y. S. 2d 774; People v. Sparks, 1 County Court, Westchester County, August, 1951". (Emphasis supplied.)

CONCLUSION

For all of these reasons petitioner respectfully prays that this Court issue a writ of certiorari to the New York State Court of Appeals to review the order of the Appellate Division affirming the order of the County Court of Nassau County, made and entered on June 22, 1954, affirming the judgment imposed on petitioner on September 8, 1932.

Dated: New York, N. Y.
February 20, 1956

Respectfully submitted,

MAURICE EDELBAUM,
Attorney for Petitioner.

FREDERICK S. ABRAMS,
On the Brief

APPENDIX

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 14th day of March, 1955.

Present:

HON. GERALD NOLAN,
Presiding Justice,

" HENRY G. WENZEL, JR.,
" GEORGE J. BELDOCK,
" CHARLES E. MURPHY,
" FREDERICK G. SCHMIDT,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

AUGUST FAUCETTA,
Appellant.

ORDER ON APPEAL FROM ORDER.

The above named August Faucetta, the defendant in this action having appealed to the Appellate Division of the Supreme Court from an order of the County Court of Nassau County, entered in the office of the Clerk of the County of Nassau on the 22nd day of July, 1954, denying, after a hearing, defendant's application in the nature of

a writ of error coram nobis to vacate a judgment of said Court, convicting him of robbery in the first degree on his plea of guilty, etc., herein, and the said appeal having been argued by Mr. Maurice Edelbaum of Counsel for appellant, and argued by Mr. Edward Margolin, Assistant District Attorney, of Counsel for respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

It is Ordered that the order so appealed from be and the same hereby is unanimously affirmed.

ENTER:

JOHN J. CALLAHAN
Clerk